ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED MARCH 15, 2001)
(EXCEPTIONS DUE 4-6-01)
(REPLIES TO EXCEPTIONS DUE 4-30-01)

FEDERAL MARITIME COMMISSION

DOCKET NO. 99-18

STALLION CARGO, INC.-POSSIBLE VIOLATIONS OF SECTIONS 10(a)(1) AND 10(b)(1) OF THE SHIPPING ACT OF 1984

Respondent Stallion Cargo, Inc., a non-vessel operating common carrier, found to have violated sections 10(a)(1), 10(b)(1) and 10(b)(2)(A) of the Shipping Act of 1984, as amended, at various times in 1998, 1999, and 2000, by misdescribing cargoes tendered to vessel-operating carriers on 15 occasions and by failing to charge its applicable tariff rates on 152 occasions.

Respondent found to have committed violations knowingly and willfully and to have continued a number of them for a time even after warning. However, respondent has shown that there are mitigating factors which, by law, must be considered before determining sanctions and penalties, such as the respondent's small size, its weak financial situation, its corrections to its tariff, albeit belated, lack of evidence of continuing violations, and its expressed willingness to reform.

Revocation of respondent's license and suspension of its tariff are found to be too severe in view of the mitigating factors. However, a cease and desist order is issued and a civil penalty of $50,000 is assessed in consideration of the mitigating factors and respondent's ability to pay.

Respondent is not precluded from making an offer of settlement even at the briefing stage and, if the offer is rejected, may present its specific position on the amount-of-civil-penalty issue, although BOE took no specific position on the issue.

Vern W. Hill and *Julie L. Berestov* for the Bureau of Enforcement.
Carlos Rodriguez and *Daniel W. Lenehan* III for respondent.

INITIAL DECISION[1] OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE

This is a proceeding instituted by the Commission by Order served October 5, 1999, to determine whether a tariffed and bonded NVOCC (non-vessel operating common carrier) violated two sections of the Shipping Act of 1984, namely, sections 10(a)(1) and 10(b)(1) of the 1984 Act, the latter section being rewritten as of May 1, 1999, and now appearing as section 10(b)(2)(A) of the Act, pursuant to the Ocean Shipping Reform Act of 1998, P.L. 105-258, 112 Stat. 1902 (OSRA).[2] According to information before the Commission at the time of the Order, it appeared that respondent Stallion Cargo, Inc. might have violated these laws on several occasions in September and October 1998. In addition to these particular issues, the Commission framed four more relating to possible assessment of civil penalties, suspension of Stallion's tariff, suspension or revocation of Stallion's license as an OTI (ocean transportation intermediary) and a possible cease and desist order. The issues as framed by the Commission's Order are as follows:

1) whether Stallion Cargo, Inc. violated section lO(a)(1) of the 1984 Act by knowingly and willfully obtaining transportation at less than the rates and charges otherwise applicable through the means of misdescription of the commodities actually shipped;

'This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

[2]See Order of Investigation and Hearing at 3 n. 4.

2) whether Stallion Cargo, Inc. violated section 10(b)(1) of the 1984 Act by charging, demanding, collecting or receiving less or different compensation for the transportation of property than the rates and charges shown in its NVOCC tariff;[3]

3) whether, in the event violations of sections 10(a)(l) and 10(b)(l) of the 1984 Act are found, civil penalties should be assessed against Stallion Cargo, Inc. and, if so, the amount of the penalties to be assessed;

4) whether, in the event violations of sections 10(a)(1) and 10(b)(1) of the 1984 Act are found, the tariff of Stallion Cargo, Inc. should be suspended;

5) whether the Ocean Transportation Intermediary license of Stallion Cargo, Inc. should be suspended or revolted pursuant to section 19 of the 1984 Act; and

6) whether, in the event violations are found, an appropriate cease and desist order should be issued.

Using the Commission's discovery processes, the Commission's Bureau of Enforcement (BOE), charged with the duty of adducing evidence, developed evidence based upon relevant shipping documents which were examined by BOE's witness, Mr. Alvin N. Kellogg, the Commission's New Orleans Area Representative. As is customary in cases of this type, the evidentiary record was developed by means of written evidence submitted in various stages by both sides with opportunity for each side to request cross-examination or to submit such rebuttal evidence as would be necessary to preserve due-process rights. Accordingly, the evidence was offered and admitted in the following stages: BOE's direct case, respondent's answering case, BOE's rebuttal

[3]As mentioned above, section 10(b)(l) was rewritten without substantive change and now appears as section 10(b)(2)(A) of the 1984 Act, effective May 1, 1999.

case, respondent's surrebuttal case, and BOE's final response to the previous submission. Thereafter, the evidentiary record was closed and the parties filed their briefs in three stages, BOE's Opening Brief, respondent's Answering Brief, and BOE's Reply Brief.[4]

The Issue Under Section 10(b)(2)(A) of the Shipping Act of 1984

The Commission's Order of Investigation and Hearing, which was served on October 5, 1999, refers to events that occurred in September and October 1998 that might have constituted violations of section 10(b)(1) of the 1984 Act. The Order thus did not contemplate events that occurred after May 1, 1999, the effective date of OSRA. BOE has submitted evidence of violations after that date and refers to the successor statute, section 10(b)(2)(A), as being applicable to these later violations. (See BOE's Opening Brief at 21 n. 9.) The fact that BOE introduced evidence under the later statute, although the Commission's Order did not specify section 10(b)(2)(A) as possibly having been violated, could arguably raise a question as to whether Stallion was given adequate notice so that Stallion could seek to present a complete defense. However, I believe that under the circumstances there was no need for a formal amendment to the Commission's Order so as to update the Order to cover the evidence of later post-OSRA violations for several reasons.

[4]It is the Commission's policy to seek to decide cases on the basis of written evidence unless the nature of the issues is such that an oral trial-type hearmg is necessary. See the Order of Investigation and Hearing in the instant case at *5; Avoidance of Trial-type Oral Hearings,* Informal Statement of Policy, 17 S.R.R. 457 (1977). The use of such "paper" hearings has been upheld by numerous courts. See, e.g., *State of Pa. v Riley, 84* F.3d 125, 130 (3rd Cir. 1996), and cases cited therein; *Boston Carrier, Inc. v. I. C. C., 728* F.2d 1508, 1511 n. 5 (D.C. Cir. *1984); Cities of Carlisle and Neola, Iowa v. F.E.R.C.,* 741 F.2d 429, 431 (D.C. Cir. 1984).

First, there was no substantive change in the law as between section 10(b)(l) and 10(b)(2)(A). Both laws make it a violation for a carrier to adhere to its tariff rates.' Secondly, Stallion has not raised a due-process argument and, in fact, has been on notice by BOE of the evidence of the post-May 1, 1999 violations and has defended against such evidence. It is held that when parties litigate issues either expressly or implicitly there is no denial of due process regardless of the original pleadings. *See Agreement* No. *9955-1,* 18 F.M.C. 426, 463-464 (1975), and cases cited therein; *Rodriguez* v. *Doral Mortgage Corp.,* 57 F.3d 1168, 1172 (1st Cir. 1995) (defendant may impliedly consent to trial of an unpleaded issue when it does not object to introduction of evidence on the unpleaded issue); *Southwest Sunsites, Inc. v. F. T. C., 785* F.2d 143 1, 1435 (9th Cir. 1986) (due process is satisfied if the party proceeded against understood the issue and was afforded full opportunity to justify his conduct); Rule 15(b), F.R.C.P. (if issue is tried by express or implied consent, original pleadings may be amended but failure to do so does not affect the result of the trial on the issue). In the instant case BOE has introduced evidence that it contends to show violations of tariff-adherence law that occurred after May 1, 1999, and would fall under section 10(b)(2)(A) and Stallion has mounted specific defenses to at least 33 of these alleged

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[5]Section 10(b)(1) of the 1984 Act had stated in pertinent part that:

> (b) No common carrier . . . may-(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts.

Section 10(b)(2)(A) states in pertinent part that:

> (b) No common carrier . . . directly or indirectly, may-(2) provide service in the liner trade that-(A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published . . . under section 8 of this Act.

violations that occurred between January and June 2000. I therefore find no violation of due process by finding violations of the current law.

FINDINGS OF FACT

The following findings of fact provide details of Stallion's violations of sections 1 O(a)(l), 10(b)(1) and 10(b)(2)(A) of the 1984 Act. In addition there are findings of fact concerning how Stallion was investigated by Commission representatives and other facts pertaining to Stallion's operations as an NVOCC. The findings are drawn mainly but not entirely from BOE's Opening Brief where the record references can be found, as amended or supplemented as need be. Most of the violations are essentially not disputed by Stallion, which instead relies upon mitigating and equitable factors to offset what Stallion contends to be excessive penalties and sanctions advocated by BOE.

Findings with Respect to Background on Stallion Cargo, Inc.

1. Stallion Cargo, Inc. ("Stallion") is a tariffed and bonded non-vessel-operating common carrier ("NVOCC"), FMC Org. No. 010474.

2. Stallion's office is located at 8012 N.W. 29th Street, Miami, Florida 33122.

3. In compliance with the Ocean Shipping Reform Act (OSRA), Stallion filed an application for a license to operate as an ocean transportation intermediary on April 26, 1999.

4. Stallion is currently operating under an OTI license issued by the Commission's Bureau of Consumer Complaints and Licensing.[6]

5. The President of Stallion is Rafael Croes who occupies the position of President and owns 100% of the capital stock in the company.

Findings with Respect to Section 10(a)(1) Issues

6. Stallion was a regular shipper in the trade from Port Everglades, Florida to the port of Oranjestad, Aruba, Netherlands Antilles.

7. On November 17, 1998, the New Orleans Area Representative Alvin N. Kellogg, along with Miami Area Representative Andrew Margolis, visited the offices of Stallion where they interviewed Mr. Jorge Palacios, Stallion's General Manager. During the discussion, Mr. Palacios told the Area Representatives that Stallion ships one or two consolidated containers per week from Miami or Port Everglades, Florida to Aruba and uses either SeaFreight Line Ltd. ("SeaFreight") or King Ocean Service de Venezuela, S.A. ("King Ocean") as the common carrier for its shipments. Each container consists of approximately eight (8) to twelve (12) individual shipments.

8. At the request of the Area Representatives, Mr. Palacios provided a recent shipment file for their examination. The individual Stallion house bills of lading showed that the shipments consisted of various commodities. However, the ocean bill of lading declared the commodity to be empty plastic bottles.

[6] At the time of the submission of the First Kellogg Statement by BOE into the evidentiary record, Stallion was operatmg under a provisional license inasmuch as an official license had not yet been issued by the Commission.

9. Mr. Palacios explained the inconsistency in the commodity descriptions on the house and the ocean bill of lading by stating that the cargo was declared empty plastic bottles because this was one of the lowest rates offered by the ocean common carriers. According to Mr. Palacios, the difference in the rate for the mixed commodities and the rate for empty plastic bottles was as much as four to five hundred dollars per container. Mr. Palacios further stated that this practice was common in the trade.

10. Stallion provided documentation, including ocean carrier and Stallion house bills of lading, for all of Stallion's shipments during the months of September and October 1998.

11. Stallion originated eight (8) ocean shipments covering the movement of ten (10) consolidated containers and one non-containerized automobile during a two-month period from September 4, 1998 until October 30, 1998. King Ocean was the vessel-operating common carrier ("VOCC") on five (5) of these shipments which were transported from Port Everglades, Florida to Aruba. The other three (3) shipments were transported by SeaFreight also from Port Everglades, Florida to Aruba. In each of the eight (8) shipments, Stallion is listed as the shipper on the VOCC ("master") bills of lading. Due to the fact that Stallion consolidates its shipments, the cargo reflected in the eight (8) master bills is covered by ninety-three (93) corresponding house bills of lading.

12. With respect to each of the eight (8) shipments documented by a master bill of lading and Stallion's house bills of lading, an inaccurate commodity description was furnished by Stallion to King Ocean and SeaFreight.

13. In each of the five (5) shipments carried by King Ocean, the containerized cargo is described on the master bill of lading as either "plastic containers" or "empty plastic containers." Two of the King Ocean master bills also list the shipment of an automobile or pick-up truck in the

containers. In each of the three (3) shipments carried by SeaFreight, the containerized cargo is described to SeaFreight as "electrical appliances" in one instance and as "plastic containers" in two instances.

14. The Stallion house bills of lading corresponding to each master bill of lading document the shipment of a variety of commodities, including, but not limited to, automobiles, wearing apparel, advertising material, tires, lamps, building material, store stock merchandise, novelties, office equipment, footwear, auto parts, and hardware.

15. Each of Stallion's house bills of lading contains the commodity description, declared weight and measurement of the cargo, as well as the amount of the ocean freight assessed by Stallion. None of Stallion's house bills of lading describes the commodity as "plastic containers" or "empty plastic containers." The Stallion house bills of lading corresponding to SeaFreight's master bill wherein the commodity is described as "electrical appliances" do not list electrical appliances as one of the commodities.

16. The Shipper's Export Declarations and ocean cargo manifests were provided by Stallion in response to BOE's Request for Production of Documents served on November 4, 1999. Stallion is listed in the "exporter" box on each of the Shipper's Export Declarations corresponding to eight (8) master bills of lading. Furthermore, the commodity is described as "plastic containers" on each Export Declaration. In three (3) instances, an automobile is listed in addition to the "plastic containers." However, the accompanying ocean cargo manifests generated by Stallion in its regular course of business document the shipment of a variety of commodities none of which includes "plastic containers."

17. In order to determine the extent to which Stallion obtained transportation at less than those rates and charges otherwise applicable, Mr. Kellogg ascertained those rates which would have applied under the correct descriptions for the commodities as reflected on the house bills of lading issued by Stallion.

18. The applicable rates for the review of the shipping documentation provided by Stallion are those under the tariff of the Aruba Bonaire Curacao Liner Association ("ABC'), FMC No. 006 176-004. Both King Ocean and SeaFreight were participating carriers in ABC during the period of time at issue.

19. To conduct the re-rating of the shipments, Mr. Kellogg examined the master and house bills of lading to ascertain the origin and destination of the shipment, to confirm the size of the container utilized, as well as the specific commodity involved in each shipment in order to determine the applicable rate pursuant to the ABC tariff. Mr. Kellogg rated the commodities under the general category of "Freight All Kinds" (FAK). Stallion's shipments meet the criteria for the commodity description for FAK in ABC's tariff.

20. Mr. Kellogg compiled a table of calculations which reflects, by shipment, both the rate initially charged either by King Ocean or SeaFreight and the applicable FAK rate under ABC's tariff. These calculations do not include the bill of lading processing fees and origin and destination surcharges. These additional charges applied equally to the rate assessed by King Ocean and SeaFreight based on the misdescriptions, as well as to the applicable rate for the cargo as correctly described.

21. The table attached to Mr. Kellogg's statement also sets forth the difference, or the amount of undercharge, by which Stallion obtained transportation at less than the applicable rates. In all, the resulting undercharges aggregate $7909 for the eight (8) shipments cited.

22. From July 2, 1999 until December 3, 1999, Stallion originated at least seven (7) ocean shipments transported by King Ocean from Port Everglades, Florida to Aruba. Each of the seven (7) shipments is documented by a King Ocean master bill of lading which is accompanied by several corresponding house bills of lading, as well as an ocean cargo manifest generated by Stallion. Stallion is listed as the shipper on each of the seven (7) master bills.

23. With respect to the seven (7) shipments, Stallion has continued to furnish inaccurate commodity descriptions to King Ocean. With respect to one shipment, the cargo is described as "building materials" on the master bill of lading. With respect to the other six (6) shipments, the containerized cargo is described as either "appliances" or "electrical appliances."

24. Stallion's house bills of lading corresponding to each master bill of lading, as well as the ocean cargo manifests, document the shipment of a variety of commodities including, but not limited to, store stock merchandise, wearing apparel, advertising material, sporting goods, household goods, and auto parts.

25. In order to determine the extent to which Stallion obtained transportation at less than those rates and charges otherwise applicable, Mr. Kellogg sought to ascertain those rates which would have been applied by King Ocean pursuant to the correct descriptions of the commodities as reflected on Stallion's house bills and ocean cargo manifests.

26. The tariff of the Aruba Bonaire Curacao Liner Association ("ABC") applied because King Ocean continued to be a participating carrier during the time period wherein these seven (7)

shipments were transported. Since the enactment of OSRA effective on May 1, 1999, ABC's tariff is published on the inter-net by E-Transport at http://rates.etransport.com/.

27. To conduct the re-rating of these shipments, Mr. Kellogg examined the master and house bills of lading, as well as the ocean cargo manifests to ascertain the origin and destination of the shipment, to confirm the size of the container utilized, as well as to establish the commodities involved in each shipment in order to determine the applicable rate pursuant to ABC's tariff, FMC No. 006176-004. Mr. Kellogg rated the commodities under the general category of "Freight All Kinds" (FAK). Stallion's shipments meet the criteria for the commodity description for FAK in the ABC tariff.

28. Mr. Kellogg compiled a table of calculations which reflects, by shipment, both the rate initially charged by King Ocean and the applicable FAK rate under ABC's tariff, as published by E-Transport. Mr. Kellogg's calculations reflect a comparison of rates which are inclusive of all relevant charges such as the bill of lading processing fees, as well as the origin and destination surcharges.

29. The table attached to Mr. Kellogg's statement sets forth the difference, or the amount of undercharge, by which Stallion obtained transportation at less than the applicable rates. In all, the resulting undercharges aggregate $3440 for the seven (7) shipments cited.

Findings with Respect to Section 10(b)(1) and 10(b)(2)(A) Issues

30. Mr. Kellogg first examined Stallion's tariff in November, 1998 as part of his routine review of trade practices between the U.S. Gulf Coast and South America. The only commodity rate

that was published in the tariff, which became effective on September 15, 1996, was that of Cargo, N.O.S.

31. During his visit to Stallion's office on November 17, 1998 with the Miami Area Representative, Mr. Kellogg questioned Mr. Palacios regarding Stallion's failure to file commodity rates in its tariff. Mr. Palacios stated that he could not understand why other rates were not on file. He indicated that faxes had been sent to the tariff publisher requesting that changes be filed. However, Mr. Palacios was unable to produce copies of any of these faxes.

32. Mr. Kellogg told Mr. Palacios that Stallion was required to immediately publish all of its active rates and charges in its tariff.

33. In order to determine the extent to which Stallion may have charged or collected different compensation from its shipper clients for the transportation ofproperty than those rates and charges otherwise applicable, Mr. Kellogg sought to ascertain those rates which would have applied under Stallion's tariff to theninety-three (93) shipments handled by Stallion from September 4, 1998 to October 30, 1998.

34. The commodity rate section of Stallion's tariff, FMC No. 010474-002, as published during the time period at issue contained only a Cargo, N.O.S. rate specifically applicable to shipments from Miami, Florida to Aruba at $154.00 W/M, effective September 15, 1996 (TLI # 0000-00-1000-0017).

35. Comparing the filed Cargo, N.O.S. rate applicable under Stallion's tariffwith the ocean freight assessed by Stallion on the ninety-three (93) house bills of lading, Stallion undercharged its shippers on eighty (80) shipments in the amount of $32,233.96 and overcharged two shippers in the amount of $96.87.

36. Mr. Kellogg compiled a table of calculations which reflects, by shipment, both the rate charged initially by Stallion to its customers, as well as the rate applicable under Stallion's tariff for the commodity as rated in accordance with the TLI for Cargo, N.O.S.

37. The table attached to Mr. Kellogg's statements sets forth the difference, or the amount of undercharge and overcharge, by which Stallion failed to charge or collect the applicable transportation rates set forth in its tariff.

38. In order to determine the level of Stallion's adherence to its own tariff since the visit of the Area Representatives to Stallion's office in Miami on November 17, 1998, Mr. Kellogg reviewed twenty-four (24) house bills of lading provided by Stallion in response to BOE's Request for Production of Documents. These bills document the movement of twenty-four (24) shipments from Miami, Florida to Aruba and encompass a six-month time period from July 2, 1999 to December 3, 1999.

39. Stallion's tariff as published since the enactment of OSRA, at www.ratequest.net/etm.html by Effective Tariff Management, reveals that prior to October 21, 1999, the only rate on file in Stallion's tariff was that of Cargo, N.O.S.

40. On October 21, 1999, Stallion tiled rates for several commodities including, but not limited to, FAK, wearing apparel, appliances, electronic equipment, vehicles, furniture, sporting goods, advertising materials, building materials, store stock merchandise, groceries, and hardware. According to the tariff, these new commodity rates are applicable to the route originating in Miami, Florida and destined for Aruba.

41. Comparing the filed rates in Stallion's tariff with the ocean freight assessed by Stallion on the twenty-four(24) house bills of lading, Stallion failed to follow its tariff by undercharging its

shippers on twenty-three (23) shipments in the amount of $17,636.92 and overcharging one shipper in the amount of $3,190. Three (3) of the twenty-four (24) misrated shipments were transported subsequent to Stallion's amendment of its tariff on October 21, 1999. Mr. Kellogg's rate comparison takes into account this change in Stallion's tariff.

42. Mr. Kellogg compiled a table of calculations which reflects, by shipment, both the rate charged initially by Stallion to its customers, as well as the rate applicable under Stallion's tariff for the commodities as listed on the house bills of lading.

43. The table attached to Mr. Kellogg's statement sets forth the difference, or the amount of undercharge and overcharge, by which Stallion failed to charge or collect the applicable transportation rates set forth in its tariff.

44. Mr. Kellogg reviewed the shipping documents submitted by Stallion as part of its Direct Case and Surrebuttal Evidence, including the relevant attachments.

45. Stallion originated at least twenty-three (23) ocean shipments encompassing 333 Stallion house bills of lading during a five-month period from January 14, 2000 until June 30, 2000. King Ocean was the VOCC on eleven (11) of these shipments which were transported from Port Everglades, Florida to Aruba. Twelve (12) shipments were transported by SeaFreight also from Port Everglades, Florida to Aruba.

46. Stallion failed to follow its tariff by undercharging its shippers on forty (40) shipments in the amount of $21,301.58 and by overcharging its shippers on six (6) shipments in the amount of $1,446.48. A total of forty-six (46) of Stallion's 333 shipments were incorrectly rated for a percentage of 13.8.

47. With respect to seventeen (17) of the forty-six (46) shipments, Stallion applied a Cargo, N.O.S. rate of $15 per package despite the fact that there was a specific commodity listing in Stallion's tariff for each of the commodities declared on the Stallion house bills of lading.

48. With respect to ten (10) of the forty-six (46) shipments, Stallion included footwear in the definition of "Wearing Apparel" thereby applying the rate for Wearing Apparel, N.O.S. as listed in Stallion's tariff.

49. Footwear and Wearing Apparel are generally listed as separate commodities in tariffs.

50. Stallion's tariff does not have a listing for Footwear. Furthermore, the commodity description published in Stallion's tariff is for "Wearing Apparel, VIZ.:". The VIZ list which accompanies this description does not include footwear.

51. With respect to six (6) of the forty-six (46) shipments, Stallion applied the FAK rate to the two (2) commodities listed on each bill of lading on the basis that the shipments consisted of more than two (2) commodities as demonstrated by the corresponding packing lists and invoices. However, for the FAK to be applicable, the commodities should all be listed on the house bills of lading. The packing lists and invoices merely demonstrate that the packing boxes contained multiple items all of which form a single commodity according to Stallion's tariff.

52. Each of the six (6) Stallion house bills of lading is incorrectly rated inasmuch as the FAK rate, according to Rule 2-8 of Stallion's tariff, requires that each shipment include at least three (3) commodities such that no single commodity exceeds 60% of the total.

53. Mr. Kellogg compiled a table of calculations which includes these forty-six (46) shipments. The table reflects, by shipment, both the rate charged by Stallion to its customers, as well

as the rate applicable under Stallion's tariff for the commodities as listed on Stallion's house bills of lading.

54. The table attached to Mr. Kellogg's statement sets forth the difference, or the amount of undercharge or overcharge, by which Stallion failed to charge or collect the applicable transportation rates set forth in its tariff.[7]

Findings with Respect to Respondent's Ability to Pay a Civil Penalty

55. Through May 1, 1999, Stallion maintained a bond, No. 9148033, in the amount of $50,000 with the American National Fire Insurance Company.

56. As of May 1, 1999, and pursuant to the Commission's regulations as amended by OSRA, Stallion has increased its bond to the required amount of $75,000.

57. According to Stallion's federal income tax returns, its sole shareholder, Mr. Rafael Croes, lent Stallion $174,634 in Stallion's fiscal year ending February 28, 1999, and an additional $29,000 in FY 2000, ending February 29, 2000, for a total of $203,634. (See citation to the record in Stallion's Answering Brief at 14 n. 1.)

58. Stallion is a small company with limited financial resources and operates exclusively in the trade between Florida and Aruba. Stallion furnished BOE with copies of its 1997, 1998 and 1999 tax returns and prepared a cash flow statement covering the period from March 1, 2000 through August 23, 2000. The tax returns show that Stallion lost money in each of the three years and only

[7]Mr. Kellogg corrected the table which, as corrected, shows that on the 46 shipments, Stallion overcharged by $1,446.48 and undercharged by $21,301.58.

showed a profit during the period March 1, 2000 through August 23, 2000. During this time Stallion's net operating revenue was only $8,875.48.

DISCUSSION AND CONCLUSIONS

The Section 10(a)(1) Violations

The first two issues framed by the Commission are whether Stallion violated sections 10(a)(1) and 1 O(b)(l), later section 1 O(b)(2)(A) of the 1984 Act. Section 1 O(a)(1) prohibits any person from "knowingly and willfully" obtaining or attempting to obtain ocean transportation of property by various false activities, including "false classification" or by "any other unjust or unfair device or means." BOE has presented evidence showing that Stallion violated section 1 O(a)(l) on fifteen occasions in 1998 and 1999. Eight violations occurred in September and October 1998 while seven occurred between July and December 1999. By committing such violations the evidence shows that Stallion underpaid vessel-operating carriers by $11,349. The evidence also shows that Stallion committed these violations over a period of time, even after being visited and warned by a Commission investigator and in many instances Stallion admittedly misdescribed cargoes to vessel-operating carriers for the purpose of getting the lowest rates, a practice that Stallion's General Manager Mr. Jorge Palacios stated was common in the trade. Such conduct has repeatedly been held by the Commission to constitute "knowing and willful" behavior within the meaning of section 10(a)(1) and BOE has cited a number of relevant Commission

decisions, which are too many to cite here.[8] Among them is *In re: Rubin, Rubin & Rubin Coup.*, 6 F.M.B. 235, 239 (1961), where the Commission stated in a case decided under the predecessor statute to section lo(a)(l):

> We have also held that where a shipper has doubt as to the proper tariff designation of his commodity, he has a duty to make diligent and good faith inquiry of the carrier or conference publishing the tariff. . . . A persistent failure to inform one's self by means of normal business resources might mean a shipper or forwarder was acting knowingly and willfully. Indifference on the part of the shippers is tantamount to outright and active violation and diligent inquiry must be exercised by shippers and by forwarders.

See also *Kin Bridge Express Inc.-Possible Violations of the Shipping Act of 1984,* 28 *S.R.R.* 984, 990 (I.D., administratively final, August 2, 1999), where, citing previous Commission decisions, it was stated that knowing and willful behavior in violation of section 10(a)(1) may be found because of a respondent's "pattern of indifference" to the requirements of regulatory law, a "persistent failure to inform" oneself, "intentional disregard," "wanton disregard," or purposeful and obstinate behavior akin to "gross negligence." It is clear that Stallion obtained or attempted to obtain ocean transportation at the lowest rates it could by deliberately misdescribing cargoes that it tendered to vessel-operating carriers during September and October of 1998 and between July and December 1999. Stallion does not dispute this evidence but, as I discuss below, raises equitable-type

[8] Among the many cases cited by BOE are: *Ariel Maritime Group,* 23 S.R.R. 1640, adopted in relevant part, *24* S.R.R. *517* (1987); *Ever Freight Int'l Ltd., et al.,* 28 S.R.R. 329 (I.D., admmistratively final, June 26, 1998); *Comm-Sino Ltd.-Possible Violations of Sections 10(a)(1) and IO(b)(I) of the Shipping Act of 1984, 27* S.R.R. 1201-1205 (I.D., administratively final, May 21, 1997); *Portman Square Ltd.–Possible Violations of Section 10(a)(1) of the Shipping* Act *of 1984,* 28 S.R.R. 80, X4-85 (I.D., administratively final, March 16, 1998); and *Shipman Int'l (Taiwan) Ltd.-Possible Violations of Sections 8, 10(a)(1), and 10(b)(1) of the Shipping Act of 1984,* 28 S.R.R. 100, 104-105 (I.D., admmistratively final, March 30, 1998.

defenses and cites mitigating factors in connection with the issues concerning penalties and remedial orders.

The Section 10(b)(1) and 10(b)(2)(A) Violations

BOE's evidence shows that Stallion failed to charge the applicable rates filed in its tariff on 82 occasions occurring during September and October 1998, undercharging shippers in the aggregate by $32,233.96, and overcharging in the aggregate by $96.87, in violation of section 10(b)(1) of the 1984 Act, the relevant law at the time. BOE's evidence also shows that between July 1999 and June 2000 Stallion violated section 10(b)(2)(A), the successor statute to section 10(b)(l), on 70 occasions, 24 times between July and December 1999 and 46 times between January and June 2000. BOE contends that the evidence shows a total of 152 violations of sections 10(b)(1) and 10(b)(2)(A) at various periods between September 1998 and June 2000. Included in this total are 46 shipments occurring between January and June 2000. As I discuss below, Stallion disputes BOE on 33 of these shipments. However, I find that, as BOE contends, the evidence shows a grand total of 167 violations of all the relevant statutes (15 violations of section 10(a)(1) plus 152 violations of sections 1 O(b)(1) and 1 0(b)(2)(A).[9]

Section 1 O(b)(2)(A), like its predecessor statutes, section 10(b)(1) of the 1984 Act and section 18(b)(3) of the Shipping Act, 1916, is an absolute-liability statute. That means that good

[9]At the time the violations occurred, the statutory maximum civil penalties allowable for knowing and willful violations was $27,500. Consequently, Stallion's maximum possible exposure would be $4,592,500 (167 times $27,500). However, as I discuss elsewhere in this decision, this maximum figure is out of the question considering Stallion's small size and the statutory criteria for determining civil penalties set forth in section 13(c) of the 1984 Act and the Commission's relevant regulation, 46 C.F.R. 502.603(b).

intentions, deliberateness, negligence, or the like are irrelevant to a finding of violations. What counts is whether the carrier adhered to its tariff. If it did not, the violations occurred. However, when fixing civil penalties such matters can be considered in mitigation. *See, e.g., F & D Loadline Corp., 27* S.R.R. *764,767* (1996); *Trans Ocean-Paczjk Forwarding, Inc.-Possible Violations/l 984* Act, 27 S.R.R. 409, 412 (I.D., F.M.C. notice of non-review, February 9, 1996); *Martyn Merritt-Possible Violations of Shipping Act* of *1984,* 25 S.R.R. 1295, 1300 n. 3 (I.D., adopted, 25 S.R.R. 1495 (1991)). However, violations of section 10(b)(1) and 1 O(b)(2)(A) can be "willfully and knowingly committed" within the meaning of section 13(a) of the 1984 Act for purposes of assessing up to $27,500 per violation in civil penalties. *Trans Ocean-Pacific Forwarding,* Inc., cited above, 27 S.R.R. at 412 (respondent violates section 10(b)(1) if it acts with "reckless or careless disregard" of statutory requirements). I find on this record that Stallion has acted in such fashion with regard to at least 119 (152 less 33) violations of sections 1 O(b)(1) and 1 O(b)(2)(A). I next deal with the 33 shipments as to which Stallion has raised specific defenses.

The Seventeen Shipments Which Were Charged a Cargo, N.O.S. Per-Package **Lumpsum** Rate

BOE contends that Stallion violated sections lO(a)(1), 10(b)(1), and 1 O(b)(2)(A) on a grand total of 167 shipments that occurred at various periods of time between September 1998 and June 2000. Among these 167 shipments are 33 as to which Stallion has defended its ratings as being lawful. These 33 shipments are divided into three classes, first, 17 shipments allegedly incorrectly rated under a Cargo, N.O.S. per-package rate when the tariff allegedly contained specific commodity rates for the particular shipments; second, 10 shipments of footwear which allegedly were incorrectly

rated under a wearing apparel item in the tariff; and third, six shipments that were allegedly erroneously rated under Stallion's FAK (freight-all-kinds) rate. I deal first with the 17 shipments that occurred between February and June 2000, which Stallion rated under a Cargo, N.O.S. per-package rate of $15 whereas BOE contends that there were specific commodity rates for each of the shipments so that the Cargo, N.O.S. rate should not have applied, resulting in violations of section 10(b)(2)(A), which law was in effect at the time.

Stallion believes that it has correctly rated these 17 shipments. In his Second Verified Statement, Mr. Jorge Palacios, Stallion's General Manager, testified that all of these shipments were correctly rated under Stallion's TLI (Tariff Line Item) of $15 per package lumpsum. (See para. 2a. of his Statement.) He further testified that all of the shipments measured between one and six cubic feet and that the TLI rate includes a minimum bill of lading charge and a freight consolidation fee. However, BOE's witness, Mr. Alvin Kellogg, testified that after October 29, 1999, Stallion "filed" a number of specific commodity rates and that these specific commodity rates should have been applied to the 17 shipments. (See Third Verified Statement of Alvin N. Kellogg at para. 4; see also Attachment A to that Statement listing some 18 commodity items that were published in Stallion's tariff effective October 21, 1999.)

The record contains the bills of lading for each of the 17 shipments and also a listing of the 18 specific commodity items that were added to Stallion's tariff effective October 21, 1999. (See Second Verified Statement of Jorge Palacios, para. 2a.; and Third Verified Statement of Alvin N. Kellogg, Attachment A.) Mr. Kellogg testified that there were specific commodity items in the tariff so that the $15 per-package rate would not apply. However, in his table showing all of the 17 shipments, Mr. Kellogg shows that the 17 shipments should have been rated under the minimum

bill of lading charge of $20 in Stallion's tariff. (See Attachment B to Kellogg's Second Verified Statement under the column stating "MBL" as the "Unit Rate.") As the table shows, in every shipment except two, the shippers were given a $5.00 discount, the difference between the $20 minimum bill of lading charge and the $15 lumpsum that was actually charged.[10]

The dispute regarding these 17 shipments involves principles of tariff construction or interpretation, and, more specifically, which of several tariff items should apply. There were three possible items in Stallion's tariffthat one could argue should apply. First, there is the Cargo, N.O.S. rate of $15 per package measuring between one and six cubic feet that Stallion applied (TLI 21); second, there is a specific commodity item; third, there is a minimum bill of lading charge of $20 as per Rule 6 of Stallion's tariff. (Stallion's entire tariff can be found as Attachment B to the Verified Statement of Jorge Palacios.) Stallion argues that it was correct to apply the $15 per-package rate because the shipments measured between one and six cubic feet. However, as BOE argues, that TLI rate falls under the Cargo, N.O.S. item in the tariff and Stallion's own tariff at Rule 2(8) states that "[u]nless a commodity is specifically provided for, the . , . Cargo, N.O.S. rate will apply." If the TLI is therefore ruled out by Stallion's own tariff because there is a specific commodity rate for the cargo, as Mr. Kellogg testified to be in the case, but if the particular shipment is too small, then the rate payer must look to Stallion's minimum bill of lading charge, which is Rule 6 in Stallion's tariff and states that the minimum bill of lading charge is $20 "for one bill of lading in ordinary stowage

[10]As seen from Mr. Kellogg's Table, on two shipments (Stallion HBL nos. 012014 and 013308) the shippers were overcharged by $10 and $25, respectively. However, the reason appears to be that there were two and three packages in each shipment, respectively, so that the total freight charged at the $15 per-package rate exceeded the $20 minimum bill of lading charge. It also appears from the Table that Stallion might not have correctly rated three shipments even under the $15 per-package rate that it believes is correct. See HBL nos. 0 112 17, 0 115 12, and 0116 12, which were rated as $15 each, although the actual bills of lading in the record show that there were more than one package in each shipment. However, the parties have not litigated this matter and it would be improper of me to make any findings on it.

plus additional charges as provided herein." For shipments between Florida and Aruba, Rule 6 specifies the charge to be $20. According to Mr. Kellogg's table, 15 of the 17 shipments were undercharged by $5.00 each and two were overcharged by $10 and $25. As I explain below, I find that Stallion did not apply its tariff correctly and therefore violated section 1 O(b)(2)(A) with regard to these 17 shipments but also that the violations were highly technical in nature and not committed knowingly and willfully. Stallion will be ordered to cease and desist from its current practice but I do not assess civil penalties for these particular violations.

Although I find that according to Stallion's own tariff, the minimum bill of lading charge would apply rather than the Cargo, N.O.S. $15 per-package rate (TLI 21) or the commodity item rate, reasonable persons could argue, as does Stallion, for the lower $15 lumpsum rate. Principles of tariff construction hold that if there is an ambiguity in a tariff, such ambiguity is construed against the drafter of the tariff language,[11] that if there are several different tariff items that could arguably apply, the more specific item will apply,[12] and also that if there are several different rates that could apply, the shipper gets the benefit of the lowest rate.[13] In the instant case, neither the TLI 21 $15 Cargo, N.O.S. rate nor the $20 minimum bill of lading charge is commodity-specific and,

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[11]See, *e.g.*, *United Nations Children's Fund v. Blue Sea Line,* 12 S.R.R. 1067, 1069 (1972); *United States v. Hellenic Line,* 14 F.M.C. *255, 260* (1971); *Aluminum Products of Puerto Rico, Inc. v. Trans-Caribbean Motor Transport, Inc.*, 5 F.M.B. 1, and cases cited in the appendix at vi. and vii.

[12]See, *e.g.*, *United States v. Gulf Refining Co., 268* U.S. *542,546* (1925); *Coca-Cola Co. v. Atchison, T. & S.F. Ry. Co., 608* F.2d 213, 221 (5th Cir. *1979); Corn Products Co. v. Hamburg-Amerika Line, 9* S.R.R. 79, 84 (1967); *The Carborundum Company v. Royal Netherlands Steamship Company,* 16 S.R.R. 1634, 1638 n. 3 (1977).

[13]See, *e.g.*, *United States v Gulf Refining* Co., cited above, *268 U.S.* at *546; United Nations Children's Fund v. Blue Sea Line,* cited above, *12* S.R.R. at *1069; Peter Bratti Associates, Inc. v. Prudential Lines, Inc., et al, 5* S.R.R. 611 (1965); *J.I. Case - International Divzsion v South African Marine Corp , 20* S.R.R. 1182, 1183 (1981) ("... the principle is well established that where an ambiguity exists as to the nature of the product or where a product comes within two classifications the shipper is entitled to the lower of the two rates.").

indeed, the TLI rate is more specific in terms of the dimensions of the packages (between one and six cubic feet). Moreover, by applying the $15 rate, in most cases Stallion has given the shipper the benefit of the lowest rate. Nevertheless, Stallion's own tariff has ruled out the TLI rate because the tariff also published specific commodity rates for the individual shipments. BOE has argued that Stallion should be penalized because for several years it published a "shell" tariff, i.e., one with only a single meaningless Cargo, N.O.S. rate in it and has argued correctly that NVOCCs like Stallion should publish meaningful commodity rates in their tariffs. However, effective October 2 1, 1999, Stallion did publish meaningful specific commodity rates and on February 16, 2000, published TLI 2 1, the $15 per-package rate and other rates per packages of specified dimensions. Unlike the single general cargo N.O.S. rate (which was $154 WM) which, as the Commission knows from other cases, is usually a meaningless rate that no shipper finds attractive,[14] Stallion did belatedly comply with law by publishing meaningful rates that shippers could use. I find that Stallion has violated section 1 O(b)(2)(A), violations of which do not depend upon good intentions. However, to assess civil penalties against Stallion for these 17 shipments because Stallion has rated them under a lower rate for shippers that, while not commodity-specific is specific as to cargo dimensions, would be counter to the Commission's efforts to eliminate "shell" tariffs. Therefore, the proper remedy for these 17 shipments, in my opinion, is an appropriate cease and desist order by which Stallion would be ordered to amend its tariff rule so as to permit the application of the $15 per-package rate

[14]BOE correctly argues that a Cargo, N.O.S. rate "by definition . . . is not intended for application to the majority of commodity shipments. It is a 'catchall' or 'paper' rate and does not reflect the transportation circumstances and conditions pertaining to each commodity usually reflected in a range of tariff rates." (BOE's Opening Brief at 19, citing *Trans Ocean-Pacific Forwarding, Inc , 27* S.R.R. at 413). *See* also *Total Fitness Equipment, Inc. v Worla'link Logistics, Inc.,* 28 S.R.R. 45, 65 n. 15 (I.D., adopted, 28 S.R.R. 534 (1998), affirmed without opinion as *Worldlink Logistics* v *F.M.C.,* 203 F.3d 54 (D.C. Cir. 1999) (a general cargo N.O.S. rate is really not a legitimate rate that any shipper would have to pay but is only a device to allow carriers to file lower rates without advance notice); *Best Freight Int'l Ltd.-Possible Violations of the Shipping Act of* 1984, 28 S.R.R. 447, 45 1 n. 3 (1998) (same).

notwithstanding the presence of a specific commodity or minimum bill of lading charge in the tariff if Stallion wishes to apply that $15 rate or other per-package rates to future shipments. It will be so ordered in this decision.

The "Footwear" Rating Violations

Among the grand total of violations that BOE contends to have been committed by respondent, namely, 167, there are 10 shipments of footwear that occurred between January and June 2000 in which respondent rated the footwear under respondent's tariff line item (TLI) for "wearing apparel, viz.. . ." BOE contends that these 10 shipments should not have been rated under the specific commodity item for "wearing apparel, viz." If so, then the only rate would be a higher Cargo, N.O.S. rate of $154 W/M, which respondent had not applied to the 10 shipments nor apparently to two other shipments of footwear that respondent carried in July and September 1999. (See Attachment G to Exhibit 1, Kellogg's first Verified Statement.) BOE's witness, Mr. Kellogg, who is now its New Orleans Area Representative, testified that in his 11 years' experience, "Footwear and Wearing Apparel are generally listed as separate commodities in tariffs" and that Stallion's tariff does not have a separate commodity item listed for Footwear. (Kellogg Third Verified Statement at para. 6.) Moreover, Mr. Kellogg testified that the specific items listed in Stallion's tariff after the words "Wearing Apparel, Viz." do not name footwear. *(Id.)* Stallion's witness, Mr. Jorge Palacios, its General Manager, testified, however, that Stallion interprets its tariff item for Wearing Apparel as including footwear because the tariff item lists "N.O.S." after the "viz." Moreover, according to Mr. Palacios, Stallion assessed its "wearing apparel" rate to all of its shipper customers whose commodity was footwear and has contacted its tariff publisher to add footwear as

a TLI," which should be accomplished in the next few weeks." (Second Verified Statement of Jorge Palacios at para. 2c.)

The particular tariff item in question is Item 610000, which reads: "WEARING APPAREL, VIZ.: T SHIRTS, HATS, PANTS, DRESSES, BLOUSES, ALL FABRICS AND MATERIALS, N.O.S." (See Stallion's tariff, FMC No. 002, page no. 103, Attachment B to Verified Statement of Jorge Palacios.) As Mr. Kellogg testified, the listing of commodities appearing after the "VIZ." does not include footwear. Furthermore, the fact that Stallion interprets the item to cover footwear because the "N.O.S." (not otherwise specified) notation appears at the end of the listing following the "VIZ." is not persuasive. The "N.O.S." notation could be interpreted to modify "ALL FABRICS AND MATERIALS" but there is still no specific reference to "footwear" and, as Mr. Kellogg testified, carriers generally list "footwear" as a separate commodity in tariffs. More importantly, however, as BOE correctly argues, a carrier's intent when it interprets its tariff is irrelevant because "neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with carrier's (sic) canons of construction." (See BOE's Reply to Respondent's Answering Brief at 7, citing *Corn Products Co. v. Hamburg-Amerika Lines, 9* S.R.R. 79, 84 (10 F.M.C. *388,393* (1967)); and *National Cable &Metal Co. v. American Hawaii S.S. Co., 2* U.S.M.C. 571 (1941); *see* also *Pro-Industries, Inc. v. Sea-LandService, Inc., 26* S.R.R. 156,157 (1992) ("[I]t is the plain words of the tariff, rather than the carrier's intent, that must be the determining factor.").

I conclude, as I did with respect to the preceding matter of the $15 per-package N.O.S. rate, that Stallion violated section 10(b)(2)(A) in the 10 subject instances as the relevant statute is an absolute-liability statute as to which good intentions are not relevant. However, I find the violations

to be of a technical nature and do not assess civil penalties in consideration of that fact and other mitigating factors which are relevant to the question of assessing penalties and issuing sanctions. *See F & D Loaclline Corp., 27* S.R.R. *764, 767 (1996); Marcella Shipping Co. Ltd., 23* S.R.R. 857,863 (1986). See also section 13(c) of the 1984 Act, where the Commission was instructed by Congress that "[i]n determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require." Thus, it could be argued that it is not entirely unreasonable to believe that "footwear" is a type of wearing apparel. See Webster's Ninth New Collegiate Dictionary at 48 1, defining "footwear" as "wearing apparel (as shoes or boots) for the feet." Moreover, there is no evidence that Stallion discriminated among shippers of footwear. I conclude that for these 10 violations, where no harm to any particular shipper nor discrimination among footwear shippers was shown, the remedy should not be assessment of civil penalties but rather a remedial order that Stallion cease and desist from the practice described and that Stallion amend its tariff by publishing a specific item for "footwear" or by specifying "footwear" as one of the items included in the tariff item for "wearing apparel."[15] It will be so ordered in this decision.

[15]Stallion states that it has notified its tariff publisher to amend the tariff to add "footwear." If so, a cease and desist order would probably not be necessary. However, Mr. Palacios testified on October 4, 2000 that it had notified its tariff publisher, but Stalhon's answering brief, dated February 12, 2001, makes no mention of a tariff amendment.

The Six Shipments Rated as FAK

The last dispute between BOE and Stallion concerns six shipments that occurred during the period March - June 2000. BOE's witness Mr. Kellogg testified that under Stallion's tariff, in order to qualify for the FAK (freight all kinds) rate, Stallion's "house" bill of lading should list all the items whereas the bills of lading merely list two items. Moreover, according to Mr. Kellogg, Stallion believes that if a single commodity item in the tariff under the tariff description consists of multiple components, then that makes the shipment one of multiple commodities. Therefore, the single commodity as described in the tariff is really multiple commodities. Mr. Palacios, however, testified that the actual shipments, as evidenced by the packing lists or commercial invoices, indicate that the shipments in fact contained more than two commodities per bill of lading and that no single item exceeded 60 percent of the total weight. Stallion argues that it is not the bill of lading description that controls but rather what the actual shipment comprised. The actual rule in Stallion's tariff that Mr. Kellogg believes to have been unsatisfied by the six shipments (Rule 2-8) merely states: "FREIGHT ALL KINDS APPLICABLE ONLY WHERE REFERENCE IS MADE HERETO: A) SHIPMENT MUST CONSIST OF AT LEAST THREE COMMODITIES. B) NO ONE COMMODITY SHALL EXCEED 60% OF TOTAL WEIGHT OR MEASUREMENT AS FREIGHTED."

It is true, as Mr. Palacios has testified, that in cases involving alleged failure to adhere to a tariff the determining factor is not the bill of lading description of the cargo but rather what the evidence shows to have actually been shipped. In cases involving a predecessor statute to section 10(b)(2)(A), namely, section 18(b)(3) of the Shipping Act, 1916, the Commission has so held. *See Western Publishing Co., Inc. v. Hapag-Lloyd, A.G.*, 13 S.R.R. 16 (1972); *Union Carbide*

Inter-America v. Venezuelan Lines, 14 S.R.R. 171 (1973); *European Trade Specialists, Inc. v. Prudential-Grace Lines,* 16 S.R.R. 103 1, 1039 (1976). In five of the six shipments in question," Stallion has furnished backup documentation, i.e., invoices and packing lists, that show that there were multiple components of the commodity items and that no single component of the commodity exceeded 60% of the total weight of the commodity item. However, as the Commission's experienced witness Mr. Kellogg observed, the fact that a single commodity item listed in Stallion's tariff consisted of multiple parts does not convert the single commodity item into multiple commodities. A good example of this is one of the six shipments in question that moved under Stallion's house bill of lading no. 011518. The bill of lading shows 2 packages of "AUTO PARTS" and one package of "COPY PAPER" in "3pcs." Under Stallion's interpretation of its tariff, the "auto parts" consisted of 85 separate commodities because the packing list for that shipment shows 85 different parts. However, according to Stallion's tariff there is only one commodity item that could apply to "auto parts" for the shipment dated March 31, 2000, and that is Item No. 870000-0450, for "AUTOMOBILE AND TRUCK PARTS, N.O.S." (See Stallion's Tariff, FMC No. 002, at page no. 105, issued October 22, 1999.)[17] Thus, Stallion's tariff considers all of the 80-some individual parts to be one tariff item and not 80 items. One could argue that Stallion's interpretation of its tariff rule for FAK rates is not unreasonable and that because there were many parts in the shipment, the FAK rule, which mentions three "commodities," allows Stallion to treat

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[16]The six shipments inquestionmovedunderbillsofladingnos. 011113, 011518, 011610, 012011, 013012, and 013 105. See Second Verified Statement of Jorge Palacios at para. d. There are bills of lading, packing lists, invoices, etc. for all of these bills except for the first one, no. 011113, which are missing. See Attachment C to the Statement cited.

[17]Some time after the subject shipment Stallion apparently changed the commodity description in its tariff from "Automobile and Truck Parts, N.O.S." to "Automobile parts, truck parts, boat parts, heavy equipm," effective October 12, 2000. See Attachment A to Third Verified Statement of Kellogg.

multiple parts of a commodity which is shown in the tariff as "automobile and truck parts, N.O.S." under one tariff item as multiple commodity items. However, the standard of proof in an administrative proceeding is not one of "beyond a reasonable doubt" or even "clear and convincing" evidence but rather a mere preponderance of the evidence. See *Steadman v. S.E.C. 450* U.S. 91, rehearing denied, 451 U.S. *933* (1981); *Arctic Gulf Marine, Inc., 23* S.R.R. 1422, 1434-1435 (I.D., adopted in relevant part, *24* S.R.R. *159,* (1987); *Waterman Steamship Corp. v. General Foundries, Inc.,* 26 S.R.R. 1173, 1180 (I.D., adopted inrelevantpart, 26 S.R.R. 1424 (1984). I find the evidence of Mr. Kellogg, an experienced Commission investigator, to be more persuasive than that of the self-serving evidence of Mr. Palacios. However, as mentioned above, section 1 O(b)(2)(A) is an absolute-liability statute, i.e., good faith, good intentions and reasonable beliefs do not offset the violations. Rather, such factors can be considered when fashioning remedial orders and deciding whether to assess civil penalties, as shown by the criteria set forth in section 13(c) of the 1984 Act. I conclude therefore that an appropriate cease and desist order is warranted for these six shipments, not an assessment of civil penalties. More specifically, Stallion should discontinue its current interpretation of its FAK tariff rule and either treat items in its shipments as single commodities when the items comprise multiple parts, as Mr. Kellogg suggests, or revise its tariff FAK rule so as to allow it to apply to commodities which consist of multiple parts. It will be so ordered in this decision.

The Issues as to Stallion's License, a Cease and Desist Order, and Civil Penalties

The first two issues framed by the Commission's Order concern whether Stallion violated sections 1 O(a)(l), 1 O(b)(1) and 1 O(b)(2)(A) of the 1984 Act. As discussed above, I find that Stallion

did violate those laws and did so on 167 occasions at different times in 1998, 1999, and 2000 (15 violations of section 10(a)(1) plus 152 violations of sections lO(b)(1) and 10(b)(2)(A). There is no evidence that Stallion committed further violations after June 2000, although BOE argues that because, according to BOE, Stallion misrated shipments between January and June 2000 and is still an active participant, Stallion is not in "full" compliance with the 1984 Act, and "there is considerable likelihood that Stallion is continuing to commit the violations which gave rise to this proceeding." (BOE's Reply to Respondent's Answering Brief at 9-10.) However, the evidence shows that Stallion's section 10(a)(1) violations were committed intentionally so that Stallion could obtain lower rates from vessel-operating carriers and the other violations were committed at the least with careless disregard of statutory requirements, to some extent even after Stallion had been warned by a Commission investigator. The next question is what type of sanctions or remedial orders should the Commission issue against Stallion.

General Principles Applicable to **Determining** Sanctions

In determining what sanctions and penalties should apply to a particular respondent the Commission is vested with considerable discretion. In commenting on the discretion to fix civil penalties, it was stated in *Cari-Cargo, Int.,* Inc., 23 S.R.R. 1007, 1018 (I.D., F.M.C. notice of finality, June 5, 1986):

> . . . in fixing the exact amount of penalties, the Cornmission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law. (Case citation omitted.) Obviously, "[t]he prescription of fair penalty amounts

is not an exact science," and "[t]here is a relatively broad range within which a reasonable penalty might lie." (Case citation omitted.)

The principle that the Commission is supposed to fashion remedies and sanctions or tailor remedies to fit the nature of the offense has been repeatedly recognized in a number of Commission cases since *Cari-Cargo.* See, e.g., *F & D Loadline Corp.-Possible Violations of Section IO(b)(l) of the Shipping Act* of 1984, 27 S.R.R. 764, 768 (I.D., administratively final, June 28, 1996); *Seair Cargo Agency, Inc.-Possible Violations of the Shipping Act of 1984, 27* S.R.R. 789, 791 (I.D., administratively final, September 18, 1996), citing *I.C. C. v. B & T Transportation Co.,* 613 F.2d 1182, 1184 (1st Cir. 1980) (orders should be molded to the necessities of the particular case); *Haewoo Air & Shipping Co., Ltd.-Possible Violations of the Shipping Act* of *1984, 27* S.R.R. 819, 821 (I.D., administratively final, October *29,* 1996) (same); *Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express,* 27 S.R.R. 1335, 1341 (I.D., administratively final, December 4, 1997). In *Gilbertville Trucking Co. v. United States,* 371 U.S. 115, 130 (1962), cited in *Alex Parsinia,* the Supreme Court commented on the duty of an administrative agency to tailor the remedy to the particular facts of each case in the following words:

> Our duty is to give "complete and efficacious effect to the prohibitions of the statute" with as little injury as possible to the interests of private parties or to the general public. (Case citation omitted.) As these cases indicate, the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation. The court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives just described. (Case citation omitted.) (Emphasis added.)

As the above discussion indicates and as section 13(c) of the Shipping Act of 1984 confirms, a number of equitable-type factors must be considered before determining remedies and civil

penalties. The Supreme Court has indicated that courts are supposed to defer to the judgment of administrative agencies when they assess particular penalties in the case of *Butz v. Glover Livestock Commission* Co., 411 U.S. 182 (1973), and should not overturn agency decisions merely because the sanctions imposed are not uniform in their severity. Notwithstanding *Butz,* lower courts still overturn agency-determined sanctions if they are excessive or arbitrary or are not reasonably related to the violation so as to constitute an abuse of discretion or are unwarranted in law or unjustified in fact. See, e.g., *Monieson v. Commodity Futures Trading Commission, 996* F.2d 852, 858, 862 (7th Cir. 1993); *Barnum v. National Transportation Safety Board, 595* F.2d 869, 871-872 (D.C. Cir. 1979); *Harrington v. United States, 673* F.2d *7,* 10-l 1 (1st Cir. 1982); *Reid v. Engen, 765* F.2d 1457, 1463 (9th Cir. 1985); *Cross v. United States,* 512 F.2d 1212, 1217-1218 (4th Cir. 1975).[18] Consequently, I will consider whether any particular sanction or remedial order advocated by BOE falls within the broad discretion of the Commission to issue, is tailored to the facts in this case and is reasonably designed to effectuate the purposes of the Shipping Act with as little injury as possible to the interests of private parties or to the general public, as the cases cited require. I first discuss whether to issue a cease and desist order.

Issuance of a Cease and Desist Order

The sixth and last issue framed by the Commission's Order is "whether, in the event violations are found, an appropriate cease and desist order should be issued." BOE argues that it

[18]The many cases upholding these principles can be found in West's *Federal Practice Digest, key* number 758 (Sanctions). Although "the relation of remedy to policy is peculiarly a matter For administrative competence," the Supreme Court has held that only if an agency chooses a remedy that "is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter." *American Power Co. v S.E.C, 329* U.S. 90,112-l 13 (1946).

would "be appropriate for the Commission to direct Stallion to cease and desist from violating sections IO(a)(l) and 10(b)(2)(A) of the 1984 Act." (BOE Opening Brief at 26.) BOE argues that the evidence shows that Stallion has knowingly and willfully failed to comply with these laws and that "Stallion's violations with respect to its tariff have continued even during the course of this proceeding and, in all likelihood, are ongoing." *(Id.* at 27.) Therefore, BOE argues that a cease and desist order is justified and cites a case that holds such an order to be proper if there is a likelihood that the offenses will continue. Stallion does not expressly address the cease-and-desist-order issue but concentrates on the other sanctions advocated by BOE. I agree that a cease and desist order should issue.

As was discussed in *Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express,* cited above, 27 S.R.R. at 1342-1343, a cease and desist order is generally issued when there is a reasonable likelihood or expectation that a respondent will continue or resume illegal activities. In *Alex Parsinia,* such an order was issued even though the respondents had terminated their NVOCC and freight-forwarder businesses. However, respondents had ignored Commission investigators and the Commission proceeding and had previously formed companies under new names. These facts plus the fact that issuance of a cease and desist order would enhance the Commission's ability to enforce the requirements of the Shipping Act in the event of recurrence of the past violations motivated issuance of the order.

In the instant case there is no evidence that Stallion has continued to violate the Shipping Act since at least June of 2000 and Stallion argues that it has ceased its unlawful practices and "has taken effective pro-active measures" to avoid future violations of the type found on the record. I note that the record does not show evidence of violations by Stallion after June 2000 nor is there evidence to

support BOE's argument that Stallion's tariff violations "in all likelihood, are ongoing." (BOE's Opening Brief at 27.) However, Mr. Palacios did testify that Stallion misdescribed cargoes to vessel-operating carriers in order to get the lowest rates and that, at least as far as misdescribing cargoes to vessels was concerned, the practice was common in the trade. Considering the fact that Stallion committed numerous violations of law even after being visited by a Commission investigator and even after the Commission instituted the present formal investigation and the fact that Stallion obviously wishes to continue in business in the Florida-Aruba trade, I find sufficient reason to issue a cease and desist order. See the cases cited in *Alex Parsinia,* 27 S.R.R. at 1342, in which cease and desist orders were issued when it appeared that respondents intended to continue in business."

The next question is what would be an "appropriate" cease and desist order. As was discussed in *Marcella Shipping* Co. *Ltd.,* cited above, 23 S.R.R. at 871-872, a cease and desist order, like other sanctions and penalties, must be tailored to the needs and facts of the particular case. BOE asks for an order that Stallion cease and desist from violating sections 10(a)(1) and 10(b)(2)(A) of the 1984 Act. Such a general order, while appropriate, does not focus on the particular type of conduct that Stallion observed when it violated those laws. The record shows that Stallion intentionally misdescribed cargoes it tendered to vessels in order to get lower rates. Therefore, Stallion will be ordered to cease and desist from repeating such conduct. Accordingly, Stallion is ordered to cease and desist from violating section 1 O(a)(1) of the Act by intentionally misdescribing cargoes it tenders to vessel for the purpose of obtaining lower rates than those lawfully applicable or for any other purpose. Similarly, as to Stallion's violations of section 10(b)(2)(A) (and its

[19]These cases are: *Marcella Shipping* Co. *Ltd* , 23 S.R.R. 857, 871-872 (I.D., administratively final, March 26, 1986); Cari-Cargo Int., Inc., 23 S.R.R. 1007, 1021-1022; *Low Cost Shipping, Inc. et al., 27* S.R.R. 686 *(1996); American Star Lines,* Inc., 25 S.R.R. 1153 (1990) (I.D., administratively final, October 3, 1990).

predecessor statute, section 10(b(1) of the Act), Stallion had ignored its N.O.S. rate and charged lower unfiled rates and later, after it had published specific commodity rates, again ignored them. Accordingly, Stallion is ordered to cease and desist from its conduct in failing to charge its published rates. Furthermore, because Stallion had unlawfully interpreted its tariff so as to charge an N.O.S. per-package rate contrary to its tariff rule, as earlier described, incorrectly rated "footwear" shipments as "wearing apparel" and similarly incorrectly applied its FAK rate to commodities consisting of multiple parts, Stallion is ordered to cease and desist from these practices or to take corrective action as described earlier.[20]

The Issue Concerning Possible Suspension or Revocation of Stallion's License and Suspension of Its Tariff

The fourth and fifth enumerated issue framed by the Commission concerned the question whether, if violations are found, Stallion's tariff should be suspended and its license suspended or revolted. BOE notes that Stallion is currently operating as an NVOCC and has updated its bond to $75,000. BOE argues that Stallion's license should be revolted and its tariff suspended "until such time as Stallion reapplies to the Commission and obtains a valid license." (BOE's Opening Brief at 26.) BOE argues that an OTI license is granted to an applicant on the basis of character, among other things, citing 46 C.F.R. sec. 515.1 l(a) (1999). BOE contends that "[a]llowing Stallion to maintain its current OTI license while continuing to commit violations of the 1984 Act would be

[20]Stallion argues that "Stallion has since published a separate TLI for 'footwear' to assure that whatever perceived problem may have existed will not appear again." (Stallion's Answering Brief at 23.) If so, then that portion of the cease and desist order relating to the "footwear" violations becomes moot. However, Stallion does not cite any tariff reference to support its argument and there has been no stipulation between BOE and Stallion as to this alleged fact. Consequently, it is not something I can officially notice. See 46 C.F.R. 502.161, 502.162, 502.226.

misleading to the shipping public and potentially harmful to the Commission's standing as a regulator inasmuch as one of the qualifications for Stallion's possession of the license is 'necessary character to render ocean transportation services."' *(Id.)* Furthermore, argues BOE, "[a]s long as Stallion continues to disregard its responsibilities under the 1984 Act and commits the violations forming the basis of this proceeding, it does not have the requisite character to qualify for the Commission's endorsement of its activities via the OTI license." *(Id.)* Earlier BOE had argued that it had taken three years and the initiation of the instant proceeding to get Stallion to update its tariff with active rates despite warning and that even after updating its tariff Stallion violated law. (BOE's Opening Brief at 25.)

Stallion argues against severe penalties and sanctions on the basis of a number of mitigating and equitable-type factors. As regards assessment of a "stiff' penalty, Stallion argues that Stallion would be unable to absorb it and it "would put Stallion out of business, deprive Stallion's US customers of Stallion's experience in the trade, and disrupt the economy of Aruba." (Stallion's Answering Brief at 23.) Essentially Stallion is arguing that it is a small company serving a small trade, that it has cooperated with the Commission's staff in this proceeding, has discontinued unlawful practices, and that the type of sanctions advocated by BOE would be contrary to the Commission's announced goals in its Balanced Enforcement Program and would have a "chilling effect" on other NVOCCs that may be considering whether to cooperate with the Commission. *(Id.)* While I do not agree with everything that Stallion argues, I find that revocation of Stallion's license and suspension of its tariff are sanctions that are too extreme and are unwarranted in law and unjustified in fact.

As I discussed earlier, the Commission has considerable discretion in determining appropriate sanctions and remedies but is expected to exercise great care to ensure that the penalties are tailored to the particular facts of the case and are not unduly harsh or extreme. In other words the Commission is supposed to tailor the remedy to the particular facts. As the Supreme Court stated in *Gilbertville Trucking Co. v. United States,* cited above, 371 U.S. at 130, an agency "has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives" of the particular law and is to do so "with as little injury as possible to the interests of private parties or to the general public."

In the instant case I find Stallion to be a small company making little or no profit, serving a relatively small trade with Aruba, a small island off the coast of South America.[21] I find also that Stallion has updated its tariff and there is no evidence that Stallion has violated the Shipping Act of 1984 since at least June of 2000 to support BOE's suggestions that Stallion may still be violating law. Therefore, I cannot subscribe to BOE's argument that Stallion's license should be revoked and Stallion should be required to reapply for a license because otherwise the Commission would be "allowing Stallion to maintain its current OTI license while continuing to commit violations of the 1984 Act. . . ." (BOE's Opening Brief at 26.) The issuance of the cease and desist order is designed to discourage recurrence of Stallion's previous violations of law so that the additional sanction of license revocation and tariff suspension would, in my opinion, constitute unnecessary overkill. There are other reasons for this conclusion as well.

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[21] According to the World Almanac (2001) at page 826, Aruba is an island only 75 square miles in area with an estimated population in the year 2000 of 69,539. It is an autonomous member of the Netherlands. Its chief industries are oil refining and tourism and it is located in the Netherlands Antilles.

The Commission licenses U.S.-based ocean freight forwarders as well as NVOCCs and both are required to obtain bonds or proof of insurance for the protection of the shipping public pursuant to section 19 of the Shipping Act of 1984, 46 U.S.C. app. sec. 1718. The requirement that U.S.-based NVOCCs be bonded was enacted effective May 1, 1999, pursuant to OSRA whereas the other type of ocean transportation intermediary (OTI), the ocean freight forwarder, was under such requirement since 196 1 pursuant to the Shipping Act, 19 16. For both types of OTI the requirement is that they "be qualified by experience and character." See section 19(a) of the 1984 Act, 46 U.S.C. app. sec. 1718(a). BOE argues that because Stallion violated sections lo(a)(l), 10(b)(l) and 10(b)(2)(A) in certain months in 1998, 1999, and 2000, Stallion does not have the requisite "character" to retain its license. However; a person holding a license is given certain extra protection in law so that his license may not generally be revoked without the agency's giving the person a "second chance" to reform before instituting formal proceedings. The licensed person is thus given a property interest in his license. The doctrine is codified in the Administrative Procedure Act, 5 U.S.C. sec. 558(c). That law provides in pertinent part:

> Except in cases of willfulness or those in which the public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation or annulment of a license is lawful only if, before the institution of agency proceedings therefor. the licensee has been given-(1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity= to demonstrate or achieve compliance with all lawful requirements. (Emphasis added.)

It may well be argued that the "second-chance" doctrine in the APA does not apply to Stallion because Stallion's violations were committed knowingly and willfully. However, I cite the doctrine because in a previous case involving willful violations by a licensed ocean freight forwarder, the Commission has acknowledged the doctrine and has tempered its orders accordingly.

Thus, in the case of *E. Allen Brown-Independent Ocean Freight Forwarder, 19* S.R.R. 965 (1980), respondent Brown, a licensed freight forwarder, was found to have violated his trust as an ocean freight forwarder over 100 times by failing to pay over shippers' moneys to ocean carriers and to have failed to bring his business into compliance with law despite ample warnings and opportunities to do so. BOE's predecessor, Hearing Counsel, urged that Mr. Brown's license be revoked, arguing that he was no longer qualified to hold the license. The Commission, adopting the Initial Decision, found that Hearing Counsel's request was too extreme and that, although the APA's "second-chance" doctrine might not literally apply, the Commission was careful not to destroy businesses when there were less drastic alternative remedies available. In the case cited, Mr. Brown was attempting to pay back the moneys that he had misappropriated and the Cornmission was responsive to his plea, noting that under Hearing Counsel's recommendation, Mr. Brown's business would be destroyed and he would have no chance to make good to his creditors. Consequently, the Commission approved a carefully-tailored remedy in lieu of Hearing Counsel's drastic remedy. Mr. Brown was allowed to continue his forwarding business without handling shippers' money but was placed under probation and reporting requirements to show that he was repaying his shipping creditors. It was noted that Hearing Counsel's proposed remedy was akin to the practice ofthrowing debtors into prison where they would be unable to pay off their debts. (19 S.R.R. at 977.) Many cases were cited in *E. Allen Brown,* including *Gilbertville Trucking Co. v. United States,* cited above, 371 U.S. 115.

More recently the Commission has indicated that it intends to administer the Shipping Act of 1984, as amended by OSRA, in a balanced manner giving recognition to equities, government restraint and reliance on marketplace forces. Stallion quotes from the Commission's Strategic Plan

which was announced in September 2000 to apply for the remainder of FY 2000 through FY 2005, (See Stallion's Answering Brief at 15- 16.) One of the Commission's announced "Outcome Goals" (no. 3) is to "[f]oster the objectives of OSRA by providing regulatory assistance and encouraging voluntary compliance." The Commission describes this "Outcome Goal" by stating that it "emphasizes the Commission's intent, when possible, to assist stakeholders in achieving compliance with applicable shipping statutes via informal, fair, pragmatic approaches to its compliance and enforcement responsibilities." *(Id.* at 16.)

In reply to Stallion's reliance on the Commission's Strategic Plan announced in September 2000, BOE argues that Stallion's reliance on this Plan is "rather misguided for several reasons." (BOE's Reply to Respondent's Answering Brief at 3.) BOE argues that BOE's informal investigation as well as a significant portion of Stallion's violations occurred prior to the enactment of OSRA and to the issuance of the Commission's Strategic Plan in September 2000. Also, BOE points out that Stallion did not discontinue its unlawful operations for some time after the Commission's representative warned Stallion about its unlawful conduct. Furthermore, it did not correct its "shell" tariff for almost a year after the warning by the investigator, then only after the Commission instituted this formal proceeding, and Stallion even continued some of its violations under section 10(a)(1) for several months after the institution of this formal proceeding by the Commission, Thus, BOE discounts Stallion's later claims of discontinuance of its misconduct and even suggests that misconduct may be continuing, although there is no evidence that this is so. I recognize BOE's concerns but I do not believe that the extreme sanction of license revocation is warranted.

The evidence shows that the majority of Stallion's violations occurred prior to May 1, 1999, the effective date of OSRA.[22] However, the substantive law prohibiting the particular practices in question did not change with OSRA nor did the principles of law enunciated by the court decisions cited above requiring careful tailoring of remedies to the facts "with as little injury as possible to the interests of private parties or to the general public." By announcing its policy of encouraging compliance with law and following "fair, pragmatic approaches to its compliance and enforcement responsibilities" under OSRA, the Commission is certainly not trying to impose more drastic penalties on regulated parties for pre-OSRA violations than those that existed pre-OSRA, a matter, which, if so, might implicate due process and ex-post-facto type considerations. Moreover, even before OSRA, the 1984 Act proclaimed one of its policies to be "to establish a nondiscriminatory regulatory process . . . with a minimum of government intervention and regulatory costs" (1984 Act, section 2(1), declaration of Policy). I conclude therefore that the Commission has announced a balanced policy for enforcement under OSRA that is consistent with case law requiring a carefully balanced selection of sanctions and remedies in enforcement cases and that does not mandate extreme sanctions for pre-OSRA as well as post-OSRA violations when there are mitigating factors, especially when the pre-OSRA statutes relevant to the instant case are virtually identical to the post-OSRA statutes.

In the instant case, there is evidence that Stallion has updated its tariff, albeit belatedly. It has indicated a willingness to comply with law and there is no evidence that it has violated law after

[22] I have found the total number of violations committed by Stallion to be 167 (15 under section 10(a)(1) and 1.52 under sections IO(b)(l) and 10(b)(2)(A). Of these, 90 were committed prior to May 1, 1999 (8 violations of section lO(a)(1) in 1998, and 82 violations of section 10(b)(1) in 1998.) The remainder (77) were committed after the effective date of OSRA.

June 2000. I conclude that BOE's contention that its license should be revolted is too drastic a remedy, is unjustified in fact, and would not be consistent with the Commission's recent announced policy of enforcement nor with the Commission's tempered action in licensing cases in the past.

Similarly, I conclude that BOE's argument that Stallion's tariff should be suspended is not acceptable. If Stallion's license were to be revolted, as BOE urges, its tariff would, in effect, be suspended. BOE argues that Stallion's tariff need only be suspended "until such time as Stallion reapplies to the Commission and obtains a valid license." (BOE's Opening Brief at 26.) But BOE argues that Stallion does not have the requisite character to hold a license. How long should Stallion wait, while out of business, before it can reapply for a license and how will it show that its alleged unsuitable character has changed so that it can actually regain a license if there is to be no monitoring of Stallion's or its officer's shipping activities and Stallion is put out of business? Even now, when Stallion claims to have reformed and updated its tariff, BOE contends that Stallion is still probably violating law. Therefore, when and how can Stallion ever show that it has the requisite character to regain its license? As the Commission indicated in *Saeid B. Maralan (AKA Sam Bustani), et al.*, 28 S.R.R. 1244, 1248 (1999), issuance and enforcement of a cease and desist order is an effective means of enforcing compliance with the Act with no need for suspension or probation orders. See also *Pacific Champion Express Co., Ltd.-Possible Violations of Section 1 O(b)(l) of the Shipping Act* of 1984, 28 S.R.R. 1397 1405 (2000) (enforcement of cease and desist order is the statutorily mandated means to ensure future compliance with the 1984 Act).

The Civil Penalty Issue

The remaining issue framed by the Commission is no. 3, which reads:

> 3) whether, in the event violations of sections 10(a)(1) and 10(b)(1) of the 1984 Act are found, civil penalties should be assessed against Stallion Cargo, Inc. and, if so, the amount of the penalties to be assessed.

In other Commission formal investigations of NVOCCs the respondents often default or take extreme positions denying violations and the need for any penalties at all. However, in this case Stallion has retained counsel and has actively defended itself. As noted, Stallion does not deny generally that it violated sections 10(a)(1), 1 O(b)(l) and 10(b)(2)(A) in the past but asserts or has shown that these violations stopped some time ago in the year 2000, that Stallion has cooperated with BOE in this case, that it has taken remedial steps, that it is a small company that has only recently turned any profit at all, that a number of the violations were highly technical, and that a large number of Stallion's shipments investigated by the Commission were not found to be in violation of law. Moreover, Stallion asserts that it serves a small trade and that it cannot absorb serious civil penalties that would destroy it. Stallion does not ignore the fact that civil penalties might be assessed against it but suggests that, if so, they should be no more than $5,000 and as in a previous case involving misratings and other tariff violations by a carrier serving a small island trade (Bermuda) who had shown signs of reform, Stallion should be allowed to pay off any civil penalties over time in installments and undergo monitoring. The case cited by Stallion is *Marcella Shipping Co. Ltd.*, cited above, 23 S.R.R. 857. Stallion even suggests settlement at this stage of the proceeding. In its own words (Stallion's Answering Brief at 24), Stallion states:

> Stallion offers to settle this proceeding by payment to the Commission of a fine totaling $5,000.00, with payments to be made in installments, according to a schedule to be agreed upon between BOE and Stallion with the assistance of the Administrative Law Judge. In addition, Stallion will make its records available to the Commission at any reasonable time and on reasonable notice to enable the Commission to monitor Stallion's continued compliance with the Act.

The above recitation of events and claimed mitigating factors has not persuaded BOE to back off from its positions heretofore discussed. BOE states that Stallion's events subsequent to January 2000 cannot excuse the prior violations and states that "[d]espite the value of recent history, it is important to analyze the factual record in its entirety for the purpose of determining the appropriate level of civil penalties." (BOE's Reply to Respondent's Answering Brief at 2.) BOE cites the fact that Stallion did not correct its "shell" tariff despite earlier warning until after the Commission instituted the instant proceeding, that it undercharged shippers in a sizeable aggregate amount and admitted its violations, that it even continued some of the violations after the proceeding began, and that Stallion has the ability to pay a "substantial civil penalty" considering its $75,000 bond and the fact that its sole shareholder has lent Stallion over $200,000. As to Stallion's proposal to settle the case for $5,000, BOE argues that Stallion has had an opportunity to have confidential settlement discussions and that "a legal brief is not the appropriate venue for initiating and conducting settlement discussions." *(Id.* at 10.) Furthermore, BOE argues that "the fact that this offer of settlement was made in the last stages of the briefing process in this proceeding appears to indicate a lack of good faith on the part of Stallion." *(Id.)*

In determining the precise amount of civil penalty to assess, the Commission is required to consider some eight different factors. Thus, section 13(c) provides in pertinent part that:

> In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require.

The statute furthermore gives the Commission discretion with regard to the assessment of civil penalties, stating as follows:

> The Commission may compromise, modify, or remit, with or without conditions, any civil penalty.

It has been observed in previous cases of the instant type that the fixing of a specific civil penalty is a difficult task that involves consideration of the above numerous factors that ultimately must be weighed and reduced to one specific amount. The process is not scientifically accurate and is, of course, subjective. See discussion in *Alex Parsinia,* cited above, 27 S.R.R. at 1340; *F&D Loadline,* cited above, *27* S.R.R. at *768; Cari-Cargo Int., Inc.,* cited above, 23 S.R.R. at 1018. As the court cases, cited earlier, also illustrate, the fixing of penalties is a matter for the sound discretion of an agency like the Commission, which discretion is rather broad but is nevertheless not without reasonable limitations. Thus, although an agency is not required to assess civil penalties uniformly among similarly situated violators, some reasonable basis for the precise amount of penalties must be provided lest the agency appear to be so arbitrary as to abuse its discretion. Furthermore, as noted in *E. Allen Brown,* cited above, the Commission strives to attain compliance with the Shipping Act on behalf of regulated parties but not to destroy businesses. Furthermore, the Commission recently announced its Strategic Plan which, among other things, emphasizes "fair" and "pragmatic" approaches to the Commission's "compliance and enforcement responsibilities" and offers "regulatory assistance" and encouragement of "voluntary compliance." I see nothing in this

Strategic Plan which supports draconian orders that jeopardize a business's existence or that emphasizes nothing but punishment towards parties who show willingness to adjust their operations to the requirements of law, although, of course, the Commission cam-rot ignore the need to deter future violations. As the Supreme Court recognized in *Gilbertville Trucking Co. v. United States,* cited above, 371 U.S. at 130, it is necessary for an agency "to give 'complete and efficacious effect to the prohibitions of the statute' with as little injury as possible to the interests of private parties or to the general public."

Although BOE does not suggest any particular amount of civil penalty, it does address the matter of the statutory factors that I must weigh and balance. Thus, as to the nature, circumstances, extent and gravity of Stallion's offenses and its degree of culpability, BOE cites the evidence that Stallion willfully misdescribed cargoes that it tendered to vessel-operating carriers and failed to follow its own tariff, thus subverting the tariff law's purpose of preventing discrimination among shippers and did so for at least two years and even subsequent to the initiation of the instant proceeding by the Commission despite previous warning. Thus, argues BOE, "it took three (3) years and the initiation of this proceeding by the Commission to literally force Stallion to begin to update its tariff with active rates." (BOE's Opening Brief at 25.) BOE describes Stallion's proven violations as being of an "extensive and egregious nature" and urges "a significant civil penalty against Stallion" that "would serve as an effective message to Stallion and its competitors that the type of violations at issue in this proceeding are not to continue as 'common practice in the trade,"' *(Id.)* As to a history of prior offenses, BOE concedes that there is no history of such. However, BOE points out that Stallion had maintained only a "shell" tariff for some three years and that it is likely that there were other tariff violations committed by Stallion in addition to those uncovered by

the Commission's investigator. (BOE's Opening Brief at 23.) As to Stallion's ability to pay, BOE cites the fact that Stallion has a bond amounting to $75,000, increased from $50,000, as required by law, and that such bond is available to pay, among other things, "any penalty assessed pursuant to section 13 of this Act." (BOE's Opening Brief at 22.) Also, BOE cites the fact that Stallion's owner has lent Stallion over $200,000 in 1998 and 1999. (BOE's Reply to Respondent's Answering Brief at 9.)

As noted briefly above, Stallion argues that its violations of the Shipping Act terminated in early 2000,[23] that it has discontinued its previous unlawful practices and has updated its tariff, that the very large majority of its shipments examined by the Commission's investigator were correctly rated, that a number of violations were technical in nature, that Stallion has cooperated with BOE by furnishing requested information, and that it has taken certain "pro-active measures" to correct perceived discrepancies in its tariff. Elsewhere Stallion states correctly that no shipper complaints have ever been filed against Stallion by any of its customers. (See Stallion's Answering Brief at 5, PFF 11.) Perhaps most importantly, Stallion cites evidence in the record showing that it is a small company that has suffered losses in 1997, 1998, and 1999, amounting to $87,552, $138,710, and $7,267, respectively. Stallion cites other evidence showing that it did not earn any net income until the period March 1, 2000 through August 23, 2000, when its net operating income was only $8,875.48. The point of this evidence and argument is that Stallion is a small company of very limited financial means that consequently has a very small ability to pay any civil penalty and, if a civil penalty is assessed that is too high, Stallion's business may go under. To further support its

[23] Actually the evidence shows that Stallion's violations of section 10(b)(2)(A) continued into but not after June 2000.

argument Stallion cites record evidence, as did BOE, showing that its President and sole shareholder, Mr. Rafael Croes, lent Stallion $174,634 in FY 1998 and $29,000 in FY 1999, a total of $203,634. (Stallion's Answering Brief at 14, citing evidence of record.) Stallion contends that the loans were made for the purpose of enabling Stallion to fulfill its obligations to its customers. According to Stallion, "[d]estroying Stallion would have a chilling effect on other NVOCCs that may be considering cooperation with the Commission and voluntary compliance with the Act" and "imposing severe penalties on Stallion would violate the third outcome goal of the Commission's Balanced Enforcement program" as regards providing regulatory assistance and "encouraging voluntary compliance." *(Id.* at 23 .)

Determining a specific amount of civil penalty, as required by the Commission, requires great care. The task is made more difficult because only Stallion has proposed a specific figure, $5,000, a figure that I find to be too low. As in previous cases of this type, BOE recommends no specific amount and in this judge's experience has not done so in every case where there has been no settlement since 1986, when *Cari-Cargo,* cited above, 23 S.R.R. 1007, was decided. In *Cari-Cargo,* at the direction of the presiding judge, BOE's predecessor, Hearing Counsel, argued for specific civil penalty amounts. Hearing Counsel did so after comparing the case with analogous cases. *See Cari-Cargo,* 23 S.R.R. at 1019-1020. Hearing Counsel's recommendations were approved by the presiding judge and the Commission made the Initial Decision administratively final on June 5, 1986. Hearing Counsel's recommendations were entitled to weight not only because that office and now BOE has informally "settled," technically, "compromised," civil penalty claims against regulated businesses but because the criteria for compromising and for determining civil penalties in formal proceedings are virtually the same. Therefore, Hearing Counsel and now BOE

presumably follow the same process in settling or compromising claims as does the presiding judge in fixing civil penalties in a formal proceeding. Compare the relevant Commission regulations, 46 C.F.R. 502.603(b), regarding assessment of civil penalties in formal proceedings with 46 C.F.R. 502.604(d), regarding criteria for compromise, which adds additional factors. This similarity in criteriabetween formal assessments and informal compromises has beennoted by BOE and Hearing Counsel in numerous formal proceedings that were settled between BOE or Hearing Counsel and respondents. See Docket No. 99-15 - *David P. Kelly and West Indies Shipping & Trading, Inc.-Possible violations of the Shipping Act* of *1984,* Joint Request to Approve Settlement Agreement Granted, January 24, 2001 S.R.R., affirmed, February 20, 2001 (F.M.C.), _____ S.R.R. at page 6. The ruling cited refers to *Armada Great Lakes/East Africa Service, 23* S.R.R. 946, 956 (1986); *Marcella Shipping* Co., *Ltd.,* cited above, 23 S.R.R. at 866; and *Far Eastern Shipping Co.,* 21 S.R.R. 743,749 (1982). In *Armada,* it was stated that "those standards [i.e., the standards in relevant Commission regulations governing settlements, compromises, or assessments] provided criteria for both settlements and assessments." (Emphasis in the original.) Hearing Counsel and now BOE have customarily relied upon these cases when urging presiding judges to approve settlement agreements containing specific amounts of monetary payments in formal proceedings.[24]

As Hearing Counsel did in *Cari-Cargo,* I look for such guidance as may be available by turning to cases that bear some resemblance to the instant case. For example, in Docket No. 99-15 -

[24] Some other cases in which BOE has similarly urged approval of settlement agreements in formal proceedings are: *Longrow Shipping Ltd , 27* S.R.R. 784 (1996); *Bill Sherwood et al., 27* S.R.R. 5 19 (1996); *Solex Express, Inc., 28* S.R.R. *343* (1998); *Gstaad, Inc. and Sergio Lemme, 28* S.R.R. 1608 (2000); *I Chen "Jenny Chang" d/b/a Prestige Forwarding Co., 28* S.R.R. 1080 (1999).

David P. *Kelly, etc.*, cited above, BOE urged approval of a settlement in the amount of $30,000. Respondents were a relatively small NVOCC and its president and sole shareholder who were investigated on account of alleged violations of six different sections of the 1984 Act, because, among other things, they had operated at various times since May 1998 without a tariff, license, or bond and had obtained or attempted to obtain ocean transportation at less than the applicable rates by an unjust or unfair device or means and had continued to operate illegally despite several warnings. BOE represented that it had evidence that would sustain the allegations and show that respondents had operated unlawfully between August 1997 and September 1999. In urging approval of the settlement, BOE argued, among other things, that "BOE takes special note of the factor of ability to pay because of respondents' relative size and financial condition and asserts that '[b]oth Kelly and West Indies presented to BOE credible documentation as to the extent of their ability to pay a civil penalty."' Ruling cited at 4.

Of course no two cases are exactly alike and there are distinctions between *David P. Kelly* and the instant case. For example, in the earlier case there was evidence of at least 50 violations whereas in the instant case the evidence shows 167 violations and the time period of violations is longer in the instant case. For that reason, among others, the $30,000 payment in *Kelly* is too low for the instant case. However, the entire process of determining precise amounts of civil penalties is by its nature inexact and subjective and I cannot but help note that in the instant case, as in *David P. Kelly,* respondent Stallion has submitted evidence of its unsound financial condition but, unlike *Dnvid P. Kelly,* BOE has not altered its position. Nor has BOE itself proposed any specific

figure on brief in response to Stallion's proposal that in BOE's opinion would protect BOE's interest in enforcement.[25]

After considering the various factors as I am required to do, as well as the settlement in *David P. Kelly,* I conclude that Stallion should be and is ordered to pay a civil penalty in the amount of $50,000. I do not find that Stallion's business will be destroyed if it is required to pay such amount. As BOE correctly argues, Stallion's bond, now $75,000, is available to satisfy the penalty pursuant to section 19(b)(2)(A) of the 1984 Act in the event that Stallion cannot make the payment itself.[26] Furthermore, it may not be necessary for the surety to assist Stallion to satisfy Stallion's legal obligation to pay the $50,000. As Stallion itself argues, Stallion's president and sole shareholder, Mr. Rafael Croes, has in the past lent Stallion substantial money totaling $203,634, purportedly to assure "that Stallion continued to fulfill its obligations to its customers." (Stallion's Answering Brief at 14.) I find therefore that it is probable that Stallion has or has had access to assets that could satisfy a $50,000 obligation. For that reason I do not adopt Stallion's proposal that Stallion be allowed to pay in installments. (Stallion's Answering Brief at 24.) I so conclude even though respondents that were experiencing financial difficulties have been allowed to make periodic payments of assessed civil penalties in past cases even with the support of BOE's predecessor,

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[25] As noted briefly earlier, BOE argues that Stallion has had earlier opportunity to settle and that its offer made at the briefing stage is improper and is made in bad faith. I will return to this matter at the end of this decision.

[26] The civil-penalty assessment is directed against Stallion, not the surety. However, section 19(b)(2)(A) of the 1984 Act states that a bond "shall be available to pay any . . . penalty assessed pursuant to section 13 of this Act." *See Haewoo Air & Shipping Co., Ltd -Possible Violations of the Shipping Act of 1984,* 27 S.R.R. 819,822 (1996); *Seair Cargo Agency, Inc.-Possible Violations of the Shipping Act of* 1984, 27 S.R.R. 788, 791(1996). Stallion argues that if Stallion's bond "is used to provide the funds to pay those penalties . . . [a]s BOE well knows, such a course will result in immediate cancellation of Stallion's bond, which will immediately put Stallion out of business." (Stallion's Answering Brief at 9.) I find no support for this argument in the record. Stallion's bond contains no such suggestion in its terms. (See first Verified Statement of Alvin N. Kellogg, Attachment I.) Nor is such a statement one that BOE has stipulated to or that I can officially notice pursuant to 46 C.F.R. 502.226(a).

Hearing Counsel. See *Armada Great Lakes/East Africa Service,* cited above, 23 S.R.R. at 959, 961, 962; *Cari-Cargo,* cited above, 23 S.R.R. at 1020-1021; *Marcella Shipping Co., Ltd.,* cited above, 23 S.R.R. at 870-871. Interestingly, in *Armada* and *Marcella,* it was even ordered without objection by Hearing Counsel, that respondents could petition the Cornmission to remit the balance of civil penalty payments if they had faithfully complied with law after a certain period, such an order being authorized by section 13(c) of the 1984 Act, which, as mentioned earlier, authorizes the Commission to "modify" or "remit" a civil penalty "with or without conditions."[27] Still another case in which a just and reasonable order was fashioned to fit the circumstances of the case was *E. Allen Brown,* cited above, 19 S.R.R. at 983-984, in which, without Hearing Counsel's concurrence, respondent Brown was subject to probation and periodic monitoring to ensure that he would carry out his plan to pay back the shipping creditors that he had harmed by his unlawful actions.[28]

It is therefore ordered that Stallion shall pay civil penalties in the amount of $50,000.

The Matter of Stallion's Offer of Settlement

As discussed above, Stallion made an offer of settlement in its answering brief but BOE objected to it, arguing that Stallion could have made the offer earlier confidentially, it should not have been made at the briefing stage and it was not made in good faith. Of course, BOE is not

[27]The cases cited in which respondents were allowed to make periodic payments to satisfy civil-penalty assessments and even to petition the Commission for remission of portions of the penalties were decided in 1986. Similar installment-payment orders have not, as far as I am aware, been issued since that time and I do not believe that BOE has since then agreed to such orders nor would now agree to them. Had I not found that Stallion had or has access to financial resources, I might have recommended that Stallion be allowed to pay in installments, as Stallion has suggested, m consideration of Stallion's weak financial position.

[28]When Mr. Brown later lost his bond, the sanctions imposed on him became moot. *See E Allen Brown,* Order Partially Adopting Initial Decision, 22 F.M.C. 583 (1980).

required to accept Stallion's offer and parties cannot be forced to settle. However, the Commission has a policy that strongly favors settlements and alternative dispute resolution and I am not aware of any specific time limit on making offers to settle. The Administrative Procedure Act (APA) merely states in 5 U.S.C. sec. 554(c):

> (c) The agency shall give all interested parties opportunity for-
> (1) the settlement and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.

The relevant Commission rule, 46 C.F.R. 502.91(b), tracks the APA language. Also, it is stated at 46 C.F.R. 502.91(a):

> (a) Parties are encouraged to make use of all the procedures of this part which are designed to simplify or avoid formal litigation, and to assist the parties in reaching settlements whenever it appears that a particular procedure would be helpful.

Furthermore, the Commission has approved a settlement that was reached by the parties even after the Initial Decision was served and exceptions and replies to exceptions had been filed. See *Hemisphere Navigation Co. v. Sea-Land Service, Inc.,* 25 S.R.R. 56 (1989). BOE has itself reached settlement in formal proceedings prior to the briefing stage. See, e.g., *David P.* Kelly, cited earlier.

It may be that Stallion's offer to pay $5,000 to settle cannot be accepted or taken seriously in view of the many violations of law that Stallion knowingly and willfully committed over a period of time, However, I do not believe that Stallion is precluded from taking a specific position on brief in answer to a specific issue framed by the Commission, namely, the precise amount of a civil penalty to be assessed. The fact that BOE has not argued for any specific figure does not mean,

in my opinion, that Stallion is precluded from taking a specific position, considering the fact that Stallion is defending itself against BOE who is arguing for a "significant" civil penalty. In the instant case, Stallion's offer is so low as perhaps to support BOE's view that it was not made in good faith. However, if an offer made on brief is so low as to have no merit, BOE can easily respond to it on its merits or lack of same and in this case BOE had such an opportunity by filing the last brief. Rather than interpret BOE's position in its last brief (at 10) that "a brief is not an appropriate venue for settlement discussions" to mean that a respondent is under a time limit for offering to settle, I interpret BOE's argument to mean that Stallion's offer is so low as to be one that should not be considered seriously when determining the civil-penalty issue.[29]

Norman D. Kline
Administrative Law Judge

Washington, D.C.
March 15, 2001

[29] Prior to BOE's filing its last brief, Stallion made the same offer to settle at a conference held on February 15, 2001. BOE asked that the portion of Stallion's brief pertaining to the offer be stricken. I denied BOE's motion without prejudice and observed that "I would expect the issue to come before the Commission so that the Commission can set policy for the future." See Notice of Discussion and Rulings Made at Special Conference Striking Certain Matters, served February 15,200 1.